

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

SUPERIOR COURT
DOCKET NO. 1572CR00128

Superior Court
Barnstable, ss

Filed MAY 06 2019

Clerk

COMMONWEALTH

v.

KEVEN SEME
Defendant

**MOTION IN LIMINE
TO LIMIT CONCLUSION OF FINGERPRINT EXAMINER**

The Defendant moves, the Court rule the Commonwealth's proposed Fingerprint Examiner's testimony be limited to state: *"In my subjective opinion, based on my training and experience, I cannot exclude XXX as a possible source of the partial prints lifted from government exhibit [4]."* Where XXX stands for whoever is subject to the examiner's testimony, whether it be the Defendant or another. The proposed language is in contrast to that offered in the Fingerprint Examiner's report: *"An evaluation of that comparison resulted in an identification to the left hand of Eddie Mack."*¹ Further, utilizing the "ACE-V" methodology in analyzing fingerprints, the purported match is said to be an "Individualization": *"a individualization was made to the #7 finger, left index, of Eddie Mack Jr. This individualization was verified by Trooper Michael Lombard and Sergeant Kevin Halle."*² Such language is consistent with the limitations expressed by the Supreme Judicial Court, *Commonwealth v. Gambora*, 457 Mass 715 (2010). See also, *Commonwealth v. Joyner*, 467 Mass. 176 (2014).

Further, the Defendant moves the Court provide the following jury instruction at the time the Fingerprint Examiner testifies:

You are about to hear the testimony of a forensic fingerprint examiner, who claims special qualification in the field of fingerprint comparison, including the comparison of partial prints or latent prints recovered from the scene with known prints obtained from individuals.

Witnesses are usually permitted to testify only as to matters within their direct experience, such as what they saw or what they did on a particular occasion. Witnesses are not generally allowed to express their opinions. However, some individuals are permitted to offer their opinions because they have acquired a skill, through their training, education, or experience that few members of the general public possess. Such witnesses are frequently referred to as "experts" or "expert witnesses."

¹ Trooper Lombard's report of August 20, 2014, analysis.

² Trooper Powell's report of September 14, 2012 analysis.

Just because a witness is allowed to offer opinion testimony does not mean that you must accept his or her opinion. As with any other witness, it is up to you to decide whether you believe this testimony and wish to rely upon it. Part of that decision will depend on your judgment about whether the witness's training and experience are sufficient for the witness to give the opinion that you heard. You may also consider such factors as the information provided to the witness, and the reasoning and judgment the witness employed in coming to the conclusion that he or she testified to.

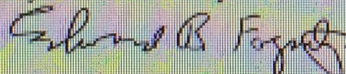
Fingerprint examiners, as a group, are not scientists, but skilled practitioners who may develop skills not possessed by members of the general public – skills that may give rise to opinions useful to you in your deliberations.

The fingerprint examiner's testimony is [his/her] subjective opinion. It should not be considered by you as conclusive fact, but should be weighed along with all the evidence that you have heard in this case. [His/her] opinion should be treated the same as any other evidence, which means that you are free to give it the weight you believe it deserves. You may accept or disregard it in whole or in part.

This request is further based upon the fingerprint evidence being speculative and therefore inconclusive, and highly prejudicial. This request supported by the above cited cases and analysis, *Gambora*, Id, *Joyner*, Id, and by the National Research Council, *Strengthening Forensic Science in the United States, A Path Forward* 102–104, 136–145 (2009) (NAS Report) which has been submitted as an independent exhibit and incorporated herein.

That such a jury instruction should be given contemporaneous with the Fingerprint Examiner's testimony is consistent with other, similar practice. The SJC in its November, 2015, Proposed Jury Instruction on Eyewitness Identification made specific provisions for such instruction. The SJC's concern in eyewitness identification was in large part due to recent research underscoring the unreliability of eyewitness identification. Defendant fingerprint evidence is in much the same position as noticed in the NAS Report and recent caselaw.

THE DEFENDANT
By His/Her Attorney



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CERTIFICATE OF SERVICE: I, Edward Fogarty, certify I have caused a copy of the above to be served upon the Barnstable County District Attorney Office, attn. Sharon Thibeault. /s/ Edward Fogarty